Petition

81-1901

Supreme Court, U.S.
FILED
FEB 18 1982
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1982

NO. _____

BERNARD FAKER & LILLIAN FAKER
Husband and Wife,

Petitioner

v.

GERALD D. ELMORE and EMILIE D. ELMORE
Husband and Wife,

Respondent

Petition for a Writ of Certiorari
To the Supreme Court of
The United States

PHILIP H. DeTURK
Attorney At Law
706 Meridian North
Puyallup, Wa 98371
Counsel for Petitioner

ISSUES PRESENTED FOR REVIEW

1. Does Washington Revised Code of Washington 4.72.050 violate the petitioner's due process rights by requiring a prima facie defense to vacate a default judgment.

2. If Washington Revised Code 4.72.050 is valid, were the trial court's actions an abuse of discretion and did those actions violate the petitioners due process rights.

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	2
Statement of the Case	4
Reasons for Granting the Writ	7
Conclusion	12
Appendix A, opinion of the Court of Appeals	14
Appendix B, Motion to set aside judgment	19
Appendix C, Earnest Money Receipt & Sale Agreement	22

CASE CITATIONS

Page

Board of Regents v. Roth , 408 US 564, 569 (1972) . . 9

Commissioner v. Duberstein , 363 US 278 (1960) 11

Grannis v. Ordean , 234 US 385, 394 (1914) 9

Griswold v. Connecticut , 381 US 479, 85 SCt. 1678, 14 L. ed 2d 510 (1965) 12,13

Memphis Light, Gas & Water Division v. Craft, 436 US 1, 16 (1977) 9

Provident Security Life Ins. Co. v. Gorsuch , 323 F2d 839 842 (Ninth Circuit 1963) 11

US v. Singer Mfg. Co., 374 US 174 (1963) 11

White v. Holm , 73 Wa2d 348, 438 P2d 581 (1968) . . . 7

Wolf v. McDonnell , 418 US 539, 558 (1974) 9

Statutes

Fourteenth Amendment 7,8,12

Federal Rules of Civil Procedure
52 (a) 3,11
55 (c) 2,3,7,8
60 (b) 2,3,8

29 ALR Fed. 7 8

5 AmJur 2d 288 10

4.72.050 2,7,9,10

IN THE SUPREME COURT OF THE UNITED STATES

BERNARD FAKER & LILLIAN FAKER, husband & wife, Petitioner, vs. GERALD D. ELMORE & EMILIE D. ELMORE, husband & wife, Respondent.	NO. _____ PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

The petitioner, Bernard Faker, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Washington, Division Two, entered in this proceeding on August 27, 1981

OPINION BELOW

The opinion of the Court of Appeals, unpublished, appears in the Appendix hereto. This motion to set aside judment entered in the Superior Court of the State of Washington in and for the County of Pierce, unpublished, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals of the State of Washington was entered on August 27, 1981. A timely petition for discretionary review before the Supreme Court of Washington was denied on November 20, 1981, and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 USC Section 1257 (3).

QUESTIONS PRESENTED

1. Wash. Rev. Code Section 4.72.050 violated the petitioner's due process rights by requiring a prima facie defense to vacate a default judgment, whereas, Federal Rule of Civil Procedure 55 (c) only requires a showing of good cause in accordance with Federal Rule of Civil Procedure 60 (b).

2. Even if Wash. Rev. Code, Section 4.72.050 is valid, the Petitioner's due process rights were still violated through an abuse of discretion.

STATUTORY PROVISIONS INVOLVED

Wash. Rev. Code, Section 4.72.050:

> "4.72.050 CONDITIONS PRECEDENT TO VACATION. The judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action; and when judgment is modified all liens and sec-

urities obtained under it shall be preserved to the modified judgment."

Federal Rule of Civil Procedure 55 (c) and 60 (b) (1):

and 52 (a):

(Rule 55) "(c) SETTING ASIDE DEFAULT. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise, set it aside in accordance with Rule 60 (b)."

"(Rule 60.) (b) MISTAKES: INADVERTENCE: EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . ."

"(Rule 52) (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law, thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similiarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

STATEMENT OF THE CASE

The respondents approached the appellants in June, 1979, to attempt to purchase the latter's mobile home park together with several mobile homes. Before initial contact with the respondents the appellants had not advertised or listed the mobile home park for sale, and had not even contemplated selling it.

The respondent, Gerald E. Elmore, had experience in similiar purchases of mobile home lots, presently owning three such places. The appellants had never examined the mobile home park market; he had no idea of the fair market value of the park. The respondents provided the figure of $275,000 as the fair market value of the park and contents.

Using the figure of $275,000 provided by the respondents and relying on the latter's assessment of the value of the park and contents, appellant and respondent negotiated an option contract. Under the terms of that oral agreement, respondent would pay consideration of $1,000 for the appellant's option, exercisable within 30 days, to accept respondent's offer of $275,000.00. The sales price would cover the mobile park and four mobile homes.

Shortly after reaching that agreement, on June 26, 1979, all parties signed an Earnest Money Receipt and Sale Agreement (Appendix hereto) at the office of Escrow Officer Mary Logan.

The Earnest Money Agreement did not accurately reflect the terms agreed upon between appellants and respondents. Furthermore essential terms were left blank at the time of signing. It is of utmost significance that the term apportioning the purchase price between the real estate and the mobile homes was left blank. That apportionment would significantly affect the amount of capital gains tax appellant would have to pay; it was thus crucial to his decision whether to accept the offer. The appellants were advised by the escrow officer they had 30 days to back out of the Earnest Money Agreement.

At the time they signed the agreement, the parties verbally agreed that at a later date it would either be amended or an addendum would be executed. "Memorandum of Fact and Authority in Support of Demand for Revision", October 3, 1979, p. 6, quoting deposition of Mary Logan of September 20, 1979.

The appellant, Bernard Faker, ascertained that the value of the park and contents exceeded $400,000. Based on that new information, the appellants exercised what they believed to be their contract right they allowed the offer to expire after 30 days.

Respondent filed suit for specific performance of the Earnest Money Agreement. Appellants hired Ronald W. Anderson, Esq., to represent them. Mr. Anderson's notice of appearance was apparently lost by Legal Messengers, Inc., and was not filed. The respondents' motion for an order of default was granted on August 15, 1979. Judgment ordering specific performance of the Earnest Money Agreement, plus costs and attorney's fees, was entered by the Pierce County Superior Court Commissioner Paul M. Boyle on August 24, 1979.

Mr. Anderson moved to vacate the judgment, which motion was denied on September 10, 1979. A demand for revision of this September 10, 1979 order was denied by the Order of Pierce County Superior Court Judge Donald H. Thompson, dated November 30, 1979. A motion for reconsideration of the latter order was brought by Mr. DeTurk, the substituted attorney for the appellants; it was denied by Judge Thompson

on December 14, 1979. The case was appealed to the Court of Appeals for the State of Washington, Division II. Judge Pearson affirmed the prior decisions and upheld the rulings that the defendants had shown no meritorious defense. Subsequently the decision was appealed to the Supreme Court of Washington in a petition for Discretionary Review, which was denied on November 20, 1981.

REASONS FOR GRANTING THE WRIT

1. Wash. Rev. Code, Section 4.72.050 CONFLICTS WITH FEDERAL RULE OF CIVIL PROCEDURE 55 (c) IN REQUIRING STRICTER STANDARDS FOR VACATION OF A DEFAULT JUDGMENT' AND THEREFORE' VIOLATES THE PETITIONER'S DUE PROCESS GUARANTEES UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Wash. Rev. Code, section 4.72.050 requires that the petitioner prove a prima facie defense in order to vacate a default judgment. White v. Holm , 73 Wash. 2d 348, 438 P2d 581 (1968). Federal Rule of Civil Procedure 55 (c) requires that good cause be shown in order to vacate a default judgment. Good cause can be proven by meeting one of the criteria set

out in Federal Rule of Civil Procedure 60 (b). In this case, Federal Rule of Civil Procedure 60 (b) (1) is applicable, ". . . mistake, inadvertence, surprise, or excusable neglect . . ." The stricter standard of proof required of the petitioner in Washington Courts place an extra burden on him and violates his procedural due process rights under the Fourteenth Amendment, since the petitioner is never afforded the opportunity for a hearing on the merits of his case.

The notice of appearance filed by Mr. Anderson, the petitioner's original attorney, was lost or mislaid through the inadvertence or neglect of another party, Legal Messengers, Inc.

> "Relief under the good cause standard of Rule 55 (c) has been deemed appropriate where the failure of defense counsel to file a timely answer was shown to have been attributed not to his own personal fault but to the neglect of a number of his clerical staff." 29 ALR Fed. 7.

Therefore, good cause was shown under Federal Rules of Civil Procedure 55 (c) and 60 (b) (1). The requirement of a prima facie defense is too burdensome where the case turns on the validity of a factual issue, on whether there was a 30 day option period. Under the Federal Rules, the petitioner would have been afforded relief of the default judgment, but in Washington, the stricter standard has denied him a trial on the merits.

The United States Supreme Court has consistently held that a hearing is required before a person can be deprived of his property interests. Memphis Light, Gas, and Water Division v. Craft, 436 US 1, 16 (1977); Wolf v. McDonnell, 418, US 539, 558 (1974); Grannis v. Ordean, 234 US 385, 394 (1914).

> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount." Board of Regents v. Roth, 408 US 564, 569 (1972).

The stricter standards forced upon Washington residents deny them a chance to defend a case where the default judgment is entered due to some minor fault. Forcing Washingtonians to prove a legal defense to a case where the situation turns solely on the facts, as in the instant case, denies them the procedural due process guarantees, which are afforded both parties in Federal Court and many of the individual states as well. The oppressive standard of Wash. Rev. Code, Section 4.72.050 infringes on the petitioner's due process rights by depriving him of a substantial property interest, consequently, the statute should be declared unconstitutional and the case remanded to the Washington courts for a trial on the merits.

2. THE COURTS OF WASHINGTON ABUSED THEIR

DISCRETION IN REFUSING TO VACATE THE DEFAULT JUDGMENT, AND THEREFORE, VIOLATED THE PETITIONER'S DUE PROCESS GUARANTEES IN DISALLOWING A TRIAL ON THE MERITS.

If the Court determines that the stricter standard of Wash. Rev. Code section 4.72.050 does not violate the petitioner's procedural due process rights, nevertheless, the decision of the Court of Appeals for the State of Washington, Division II, should be overruled because his rights were violated through an abuse of discretion.

> "A finding of the trial judgment which rests on conclusions drawn from undisputed facts or nonconflicting evidence generally does not carry the same weight on appeal as a finding resting on disputed facts or conflicting evidence, but may be treated on appeal as if it were a legal conclusion, subject to the principle that where a point of law is concerned the appellant court is not committed by the view taken by the court below." 5 Am. Jur. 2d 288.

The findings of fact and conclusions of law were entered in the Pierce County Superior Court of Washington records the same day the default judgment was declared. According to the affidavits, there is conflicting evidence, but the Judge entered the repondents statement of the facts as the findings of fact. Therefore, these findings can be treated as legal con-

clusions and controverted by this Court. The Courts of Washington abused their discretion in never considering the petitioner's version of the facts and thereby denied him his due process guarantees.

> "Under Federal Rule of Civil Procedure 52 (a), the rule that findings of facts shall not be set aside unless clearly erroneous applies in situations where findings are based on purely documentary evidence and there is no issue of credibility of witnesses. Id. in supplement 67. See, US v. Singer Mfg. Co., 374 US 174 (1963); Commissioner v. Duberstein, 363 US 278 (1960).

In the case at bar there is a definite issue of credibility of witnesses. The escrow agent, Mary Logan, should be cross-examined in order to discuss whether she is telling the truth. Therefore, the findings of fact should have been set aside and the court should have vacated the judgment and allowed a trial on the merits. In Provident Security Life Ins., Co., v. Gorsuch, 323 F.2d 839, 842 (Ninth Circuit, 1963), the court held an abuse of discretion in denying a motion to vacate a default judgment is not wrong unless good cause had been shown. This holding is the rule the Court should decide that the the Washington State Courts have failed to follow. Through an abuse of discretion the petitioner was denied a fair hearing and thereby deprived of his Constitutional rights under the

Fourteenth Amendment.

CONCLUSION

As has been outlined hereinbefore, it is the position of the petitioner that the statutes of the State of Washington have violated both his procedural and substantive due process rights. Comparison has been made to the federal rules of civil procedure, which give the petitioner a greater right to be heard. This right to be heard would appear to be covered both under substantive and procedural due process, although the argument seems primarily procedural in that it refers to a method by which the State of Washington has interferred whith the rights of Mr. Faker, it is also substantive because it deals with a particular type of interference that the petitioner feels is not permissible.

In the case of Griswold v. Connecticut, 381 US 479, 85 S. Ct. 1678, 14 L.Ed2d 510 (1965), this court spoke of what can be termed the penumbra of rights, guaranteed under due process. Those rights would appear to be the right dealing with a persons life or liberty, those rights guaranteed in the Bill of Rights of the Constitution. The Court has let it be known that it will strictly scrutinize any infringement on those rights. It is

herein submitted on behalf of Mr. Faker, that his rights to be heard at trial goes beyond the simple economic interest, which may not be subject to strict scrutiny by the court, but rather that this is one of the basic values which Justice Harlan spoke of in his concurring opinion in Griswold.

Griswold in cases subsequent to it, have indicated that reasonableness and rationality by the government are simply not enough, when the discussion revolves around a fundamental right. Rather, the governmental entity must show that there is no other reasonable way to protect his legitimate interest.

It is submitted on behalf of Mr. Faker that there are certainly other ways for the government in this case to protect its interest, namely, to follow the guideline set forth in the Federal Rules of Civil Procedure and several other jurisdictions,

Respectfully submitted,

Philip H. DeTurk
Attorney for Petitioner

Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GERALD D. ELMORE and EMILY D. ELMORE, husband and wife,	)	
Respondents,	)	No. 4467-II
v.	)	Division Two
BERNARD FAKER and LILLIAN FAKER, husband and wife,	)	Unpublished Opinion
Appellants.	)	Filed August 27, 1981

PEARSON, J.--The sole issue on this appeal is whether the trial court abused its discretion in refusing to vacate a default judgment which decreed specific performance of an earnest money land sale agreement. We hold that the sellers' failed to establish a prima facie defense to the action and affirm the decree.

Gerald Elmore approached Bernard and Lillian Faker in June 1979 and offered to purchase for $275,000 a mobile home park owned by the Fakers. The Fakers agreed to the sale and an earnest money agreement was signed. The standard form agreement contained the sentence, "The above sale price consists of four mobile homes valued at _____ and real property valued at $_____," and set an August 15, 1979, termination date.

The Fakers subsequently decided not to complete the sale. On

July 12, 1979, Bernard Faker called the escrow agent and asked how he could get out of the sale. The escrow agent advised Faker that any attempt to avoid the sale would result in a lawsuit. On July 16, 1979, the Elmores tendered the purchase price. The Fakers refused to transfer title, alleging that (1) they believed the earnest money agreement was an option contract, and (2) the escrow agent had told them they had 30 days to "back out" of the sale. The escrow agent denied this latter allegation.

The Elmores filed a complaint for specific performance on July 20, 1979. On August 6, 1979, the Fakers' attorney completed a notice of appearance. This notice was apparently lost by the legal messenger firm and therefore never filed. A default judgment was entered on August 24, 1979. On September 10, 1979, the trial court denied the Fakers' motion to vacate judgment on the grounds that there was no valid defense to the enforcement of the contract. A demand for revision was denied on November 30, 1979.

The decision to grant or deny a motion to vacate a default judgment is within the sound discretion of the trial court, and will be reversed on appeal only for abuse of discretion. Griggs v. Averbeck Realty, Inc., 92 Wn.2d 576, 599 P.2d 1289 (1979); White v. Holm, 73 Wn.2d 348, 438 P.2d 581 (1968). In reviewing the decision of the trial court, this court will consider only those arguments made to the trial court. Matthias v. Lehn & Fink Prods. Corp., 70 Wn.2d 541, 424 P.2d 284 (1967).

In deciding whether to vacate a default judgment, the court should first consider whether there is substantial evidence to support, at least prima facie, a defense to the claim asserted by the plaintiff. If a defense appears to exist, the court should then consider whether the defendant's failure to timely appear and answer was caused by mistake, surprise, or excusable neglect. Secondary factors which

should be considered by the court include whether the defendant acted with diligence after receiving notice of the default judgment, and whether substantial hardship will result to the plaintiffs if the judgment is vacated. White v. Holm, supra. Where the moving party is able to demonstrate a strong or virtually conclusive defense to defendant's claim, little consideration should be given to the reasons which occasioned the entry of the default judgment. Where, however, the moving party is able to show only a prima facie defense, the reasons for his failure to appear should be scrutinized with great care. Id.

The Fakers alleged two lines of defense in their arguments to the trial court. The first was that there was no formation of a land sale contract. In conjunction with this defense, the Fakers alleged that (1) because they believed the earnest money agreement to be an option contract, there was no mutual assent; (2) because the escrow agent, a non-attorney, gave legal advice, the earnest money agreement was illegal; and (3) the parties did not intend the agreement to be a complete integration of the contract between them. In their second line of defense, the Fakers argued that even if there was a valid contract, it should not be enforced because of undue influence.

We have examined each of the defenses asserted by the Fakers. Based on our examination, we have determined that the trial court did not abuse its discretion when it found that none of the defenses asserted by the Fakers constituted a prima facie defense to the Elmores' complaint. Each of the defenses asserted by the Fakers is examined below.

Unauthorized Practice of Law. Assuming arguendo that the escrow agent was engaged in the unauthorized practice of law (see Washington State Bar Ass'n v. Great Western Union Fed. Sav. & Loan Ass'n, 91 Wn.2d 48, 596 P.2d 870 (1978)) the Fakers cite no authority that

such fact renders an otherwise valid contract as illegal or otherwise unenforceable. Generally, the law is to the contrary where, as here, the contract is sufficiently remote from the alleged illegality and is supported by independent consideration. Sherwood & Roberts-Yakima, Inc. v. Cohan, 2 Wn. App. 703, 469 P.2d 574 (1970); Frank v. Moore, 1 Ohio App. 2d 90, 198 N.E.2d 82 (1963); Meissner v. Caravello, 4 Ill. App. 2d 428, 124 N.E.2d 615 (1954); Union Pac. R.R. v. Durant, 95 U.S. 576, 24 L. Ed. 391 (1877).

Mutual Assent. The Fakers allege that because of the representations made to them by the escrow agent at the time the earnest money agreement was signed, they believed the contract was an option contract and not an agreement for the purchase and sale of real property. The escrow agent denied making such representations, and the Elmores confirm that no such statements were made at the meeting where the earnest money agreement was signed. The agreement clearly states that it is an agreement for the sale and purchase of real property. No 30-day "back out" period is specified. If there was a mistake, it was a unilateral mistake.

No Final Agreement Between the Parties. The Fakers allege that the trial court erred in failing to admit parol evidence showing that the earnest money agreement was not intended as the final agreement of the parties. The earnest money agreement contains a place to allocate the purchase price between the real property described in the agreement and four mobile homes. The record indicates that this statement should not have been included in the agreement. Parol evidence showing that neither party intended this statement to be included in the agreement would not establish a defense to a judgment ordering specific performance on only the sale of the real property. Other potential ambiguities in the agreement were not argued to the trial court and consequently we do not consider them.

Undue Influence. Where one party is under the dominion of another, or by virtue of the relationship between them is justified in assuming that the other party will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter is induced by undue influence and is voidable. Ferguson v. Jeanes, 27 Wn. App. 558, 619 P.2d 369 (1980). It is not enough that a person is susceptible to undue influence as a result of a confidential relationship. It is also not enough that influence is exerted upon that person. Persuasion is unfair only when it overcomes the will of another. Id. In this case, the record does not support a finding that the relationship between the Fakers and the escrow agent was such that the escrow agent was able to impose her will on the Fakers. The trial court did not, therefore, err when it held that there had been no prima facie showing of undue influence.

Because there was no prima facie defense, the trial court was not required to rule on whether the default judgment was entered as a result of mistake, surprise, or excusable neglect.

For the reasons set forth above, the decision of the trial court is affirmed. Attorney's fees on appeal in the sum of $3,000 are granted to respondents. Respondents' request for terms is denied.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Swanson, J.

WE CONCUR:

Petrich, J.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FO RPIERCE COUNTY

GERALD D. ELMORE, et. ux.	)	
	)	
Plaintiffs.	)	NO. 280 527
	)	
vs.	)	MOTION FOR RECONSIDERATION
	)	
BERNARD FAKER, et. ux.	)	
	)	
Defendants.	)	

COMES NOW, PHILIP H. DeTURK, attorney for the defendant BERNARD FAKER and prays to the court to hear a motion for reconsideration of its decision in the above entitled matter in which an order denying demand for revision has been provided as a result of a hearing which was heard sometime in the past at which time the defendants were represented by one RON ANDERSON. This motion is based upon the affidavit of PHILIP H. DeTURK subjoined hereto.

PHILIP H. DeTURK
Attorney for Defendants

State of Washington)
ss
County of Pierce)

PHILIP H. DeTURK, being first duly sworn upon oath, deposes and says: That this particular matter ended up being before the court in its present status as a result of a Notice of Appearance not being processed in the usual manner. In accordance with a procedural summation which is part of the memorandum of fact and authority in the court file, Mr. Ron Anderson states that while he was retained by the defendants on August 6, 1979, the order of default against the defendant was not entered until August 15, 1979. Apparently, his Notice of Appearance went awry. As a result it was

necessary for Mr. Anderson to assert that not only was an order of default erronously entered, but also that there was a legal defense to the litigation. He has attempted to do this unsuccessfully. From Mr. Anderson's standpoint, he was in effect carrying water on both shoulders. If there is a legal defense and he was unsuccessful in getting the litigation set aside, then he may face subsequent difficulties as a result of what took place insofar as his responsibilities were concerned. If it is found that there was no legal defense, then of course, his position would be clearer inasmuch as he could subsequently maintain regardless of his other responsibilities that it would have made no difference since the plaintiffs would have prevailed regardless by way of summary judgment or otherwise.

It would appear that the defendants herein should have a right to have another attorney argue their position by either submitting additional briefs, or by having a hearing insofar as the contentions of the defendants are concerned, or that the court should allow the revision giving the defendants their chance to present the case that they would have been able to present by way of either a subsequent motion for summary judgment or trial, whichever would first take place.

The affiant hereto requests this rehearing on the theory that the court has an inate obligation to provide equity to all concerned when in the court's discretion such an issue is involved.

There is also the fact that the earnest money agreement itself is not completed and that certain items were never in agreement by the parties, thus, meaning that the inate contract itself is at the present time ambiguous. This concerns whether or not, four mobile homes are in fact included in the purchase price and if so the value of such mobiles.

Finally, this affiant has attempted to order out a report of court proceedings to determine exactly what was said by the various

attorneys and the Judge at the time this matter was heard before him. Unfortunately, Mr. Kirkpatrick's schedule is such that he is unable to get this in time to have it reviewed prior to the signing of the order of devision. It is felt that an additional two weeks is necessary to put this case in a posture where everything will be before the defendants' new attorney. Incidentally, said attorney has been advised that the court made no determination about additional attorney's fees and no motion was before it for such a consideration and the inclusion of such a clause in the proposed order denying demand for revision is superfluous and should be deleted.

FURTHER AFFIANT SAITH NAUGHT.

PHILIP H. DeTURK

SUBSCRIBED AND SWORN TO BEFORE ME THIS 29th day of November, 1979.

NOTARY PUBLIC in and for the State of Washington residing at Puyallup.

EARNEST MONEY RECEIPT & SALE AGREEMENT

THIS CONTRACT CONTROLS THE TERMS OF THE SALE OF THE PROPERTY

(PLEASE READ CAREFULLY BEFORE SIGNING)

MLS COLZ NUMBER ////////// Date Tacoma Pu yallup WASHINGTON June 26, 19 79

Received from GERALD D. ELMORE and EMILY D. ELMORE, husband and wife

hereinafter called the purchaser, the sum of ONE THOUSAND and no/100 ******* dollars ($ 1,000.00) in the form of a check for $ 1,000.00 to be held in escrow. Assignment of Funds $ _____. Note for $ _____

due _____ which funds have been paid to the agent hereinafter designated and who is authorized to hold said deposit as earnest money and as part payment on the purchase price of the following described real estate, which the purchaser hereby agrees to purchase and the seller hereby agrees to sell, located in _____ County, State of Washington, commonly known as _____ and legally described as follows:

Assessor's Property Tax Parcel or Account Number: 04-25-20-3-006

Beginning 660 feet east of the northwest corner of Lot 17 in Section; thence east 165 feet; thence south 1067 feet more or less to the northerly line of Tacoma Pupallup Road (complete description in Pierce County Treasurer's office.

Purchaser agrees to pay purchase price of TWO HUNDRED SEVENTY FIVE THOUSAND ////// dollars ($ 275,000.00) payable as follows:

$30,000.00 cash down payment, including earnest money, on closing. $245,000.00 by purchaser executing a Promissory Note secured by a Deed of Trust in favor of sellers payable in monthly installments of $2,283.74 or more, at purchasers option, including interest at the rate of 9 1/2 per cent per annum computed on the diminishing principal balance; interest to commence on closing; first payment due 30 days after closing (10th day of each month).

The above sale price consists of four mobile homes valued at $_____ and Real Property valued at $_____.

1. TITLE: Title of seller is to be free of encumbrances or defects, except: none

Existing reservations, existing easements not inconsistent with purchaser's intended use, building or use restrictions general to the district and building or zoning regulations or provisions shall not be deemed encumbrances or defects. Encumbrances to be discharged by seller may be paid out of purchase money at date of closing. Seller warrants that he has complied with all Governmental Platting Laws or regulations applicable to the subject property and seller further agrees to hold the agent and purchaser harmless from any and all liability or damages occasioned by his failure to comply with said platting laws, pay the costs thereof. In the event financing is not obtainable and providing the purchaser has exercised his her best effort to obtain same, earnest money (less credit report fee and appraisal fee, if any) shall be refunded to the purchaser.

2. FINANCING: If financing is required, purchaser shall without delay, make written application for said financing, furnish and sign necessary papers, and pay the costs thereof. In the event financing is not obtainable and providing the purchaser has exercised his her best effort to obtain same, earnest money (less credit report fee and appraisal fee, if any) shall be refunded to the purchaser.

3. NEW CONSTRUCTION: To be completed by: n/a

4. SELLER'S REPRESENTATIONS: The seller represents: (1) that the above dwelling is connected to (a) _____ public sewer system; (b) _____ passpool or septic tank; (2) that he knows of no material structural defects; (3) that all electrical wiring, heating, cooling, and plumbing systems will be in working order at the time purchaser is entitled to possession; (4) that he has no notice of any liens to be assessed against the property; (5) that he has no notice from any governmental agency of any violation of laws relating to the subject property; except none

5. PRO RATE ITEMS: Taxes for the current year, rents, interest, insurance premiums, water, light and other utilities constituting liens, and other applicable items shall be prorated between buyer and seller; buyer shall pay seller for oil or other fuel on hand, and shall reimburse seller for same held in seller's reserve account, if any; unless otherwise stated herein all adjustments are to be made as of the date of closing or, XXXXXXXXXX 19 XXXX closing.

6. POSSESSION: Purchaser shall be entitled to possession on:

7. INCLUDED ITEMS: Other than noted in Paragraph 11, linoleum, window screens, screen doors, plumbing and lighting fixtures (except floor, standing and swag lamps), built in appliances, shades, Venetian blinds, curtain rods, all attached bathroom fixtures, attached television antennae, attached carpeting, trees, plants and shrubbery in the yard, water heating apparatus and fixtures, awnings, ventilating, cooling and heating systems, attached irrigation equipment that are now on the premises, shares in light and/or water companies and association, if any, shall be included in the sale, unless otherwise noted above.

8. LEASED OR ENCUMBERED ITEMS: The property contains leased or encumbered items identified as n/a hot water tank(s), n/a heating system unit (s), n/a other _____. In the event the type of financing requires said item to be purchased, seller agrees to do so and convey to purchaser at time of closing.

9. FORFEITURE: In the event of a default by the purchaser it is agreed that the earnest money shall be forfeited as liquidated damages unless the seller elects to enforce this agreement, or seek damages for breach thereof.
In the event that either the seller or purchaser shall be caused to secure legal services or advice to enforce any of the respective rights hereunder, the non-defaulting or innocent party with respect to this enforcement provision shall be entitled to reasonable attorney's fees or account thereof, together with any costs incident to the actual legal proceeding concerning the terms of this agreement. It is agreed that a Court judgment either for the seller or purchaser shall operate to determine the innocent party as provided herein.

10. CLOSING: Closing shall be the responsibility of the Selling agent or the designated escrow agency within 10 days after title insurance policy or report preliminary thereto is delivered showing title as above provided, or after completion of financing, if financing is called for herein, whichever is later, but, in any event, not later than 07/15/79 which shall be the termination date of this agreement. For purposes of this contract, "date of closing" shall be construed as the date of conveyance of title or such other mutually agreed upon date which shall be as soon as possible

The purchaser and the seller will, on demand of either, deposit in escrow with Puget Sound Escrow all instruments and monies necessary to complete the purchase. It is understood that there are no verbal or other agreements which modify or affect this agreement and that the agent is not responsible for delivery of title or possession of the premises.
The cost of Escrow shall be borne by the seller if purchaser is financing through Federal VA, otherwise the cost shall be shared equally between seller and purchaser. This agreement is binding upon the heirs, executors, administrators, successors and assigns of the purchaser and seller.
If prior to closing, improvements on said premises shall be destroyed or materially damaged by fire or other casualty, this agreement at option of purchaser shall become null and void.

11. ADDITIONAL PROVISIONS: THE PROVISIONS PRINTED ON THE REVERSE SIDE HEREOF WHICH ARE CHECKED BELOW ARE INCLUDED IN THIS AGREEMENT:

☒ Title Insurance ☒ Conveyance ☐ As Is Clause/Inspection Report

☐ Condition of Well Clause ☐ VA Financing ☐ FHA Financing ☐ FHA/VA Requirements

12. AGREEMENT TO PURCHASE: Purchaser hereby acknowledges receipt of a copy hereof and acknowledges that he has not received or relied upon any statements made by the seller or his agent which are not herein expressed.
Purchasers offer is made subject to the acceptance by the seller on or before midnight of June 26, 1979
Notice of acceptance given to agent by seller shall be considered as given to purchaser. If seller does not accept this agreement within the time specified, the earnest money shall be refunded to purchaser on demand. Time is of the essence of this agreement.

Listing Agency _____ Purchaser _____

By _____ Purchaser _____

Selling Agency _____ Purchaser's Address 22008 76th Ave. E., Puyallup

By _____ Purchaser's Telephone No. [illegible]

13. ACCEPTANCE AND BROKERAGE AGREEMENT: _____ 19 _____
We approve this sale and agree to deliver deed or contract for deed in accordance with the terms of this agreement, and pay above agent(s) a Brokerage Fee of _____% of the gross sale price or $ _____ for services rendered. In the event the earnest money is forfeited, said money shall, after deduction of expenses incurred by the agent, or, behalf of the principals, be divided equally between the seller and agent, provided however, that the amount due the agent shall not exceed the agreed fee. I/We acknowledge receipt of a true copy of this agreement, signed by both parties. Should this transaction be subject to a 1% real estate transaction tax, the seller agrees to pay same and authorizes agent to deduct such tax from the proceeds of the sale. I/We understand I will be charged a mortgage discount in an amount not to exceed _____% to finance this transaction.

☐ The Seller's Counter Offer is hereby attached and made a part of this agreement by this reference.

Opposition

81-1901

NO.

Office - Supreme Court, U.S.
FILED
MAY 3 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

BERNARD FAKER and LILLIAN FAKER
Husband and Wife,

Petitioners,

v.

GERALD D. ELMORE and EMILIE D. ELMORE

Husband and Wife,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES ON APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

RICHARD J. DOLACK
Dolack, Hansler,
Hulscher, Burrows,
Dayhoff and Barline
Attorneys for Respondents

Office and P.O. Address:
1201 Pacific Avenue
Suite 1600
Tacoma, WA 98402
(206) 838-9061

ABCD AT CRAFTSMAN PRESS, SEATTLE

RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Do the Rules of Federal Procedure control the exercise of discretion in a state court according to state law?

2. Does the discretionary action of a judge according to state law constitute a federal question regarding a constitutional right especially where petitioners had several hearings regarding their motion to set aside a judgment?

3. Does the acceptance of benefits by petitioners bar their appeal?

SUBJECT INDEX

	Page
RESTATEMENT OF ISSUES PERESENTED FOR REVIEW	i
JURISDICTIONAL ISSUES	1
RESTATEMENT OF CASE	4
ARGUMENT	7
1.(a) Jurisdictional Argument	7
(b) Procedural Defects . . .	9
2. Issues Presented for Review	11
CONCLUSION	16
APPENDIX	

TABLE OF AUTHORITIES

Page

Table of Cases

Cardinale v. State of Louisiana, 394 U.S. 437, 22 L. Ed. 2d 398, 89 S. Ct. 1162 (1969) 8

Perry v. Allen, 239 F.2d 107 (5th Cir. 1956) at 111 11

Pennsylvania National Bank & Trust Co. v. American Home Assurance Co., 87 F.R.D. 152 (1980) at 154-155 . . . 12-13

Sibbach v. Wilson & Co., 1941, 312 U.S. 1, 10 et seq., 655, 61 S. Ct. 422, 424, 85 L. Ed. 479 12

Page

Statutes

RCW 4.72.050 3,5,12

28 U.S.C. 1257 3

28 U.S.C. 1257(3). 7

28 U.S.C. 2043(b). 2,10

28 U.S.C. 2101 3,10

28 U.S.C. 2403 3

28 U.S.C. 2403(b). 10,16

Rules

Washington Court Rule 60 3,5

Washington Court Rule 70 3,5

Supreme Court Rule 17. 2

Supreme Court Rule 17.1(c) 7

Supreme Court Rule 20. 2,10

Supreme Court Rule 28. 2

Supreme Court Rule 28.4(c) 10-11

Supreme Court Rule 29. . . . . 3 11

Supreme Court Rule 29.2. 10

Supreme Court Rule 29.4. 10

Other Authority

4 Am. Jur. 2d § 250. 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981
No.

BERNARD FAKER and LILLIAN FAKER
Petitioners,
v.
GERALD D. ELMORE and EMILIE D. ELMORE
Respondents.

BRIEF IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI

JURISDICTIONAL ISSUES

1. Does the United States Supreme Court have jurisdiction on Writ of Certiorari where:

(a) Federal questions were not properly drawn into question in state court or any violation of a constitutional right specifically claimed.

(b) Counsel for petitioners did not timely move for an extension of time in

which to file a Petition for Writ of Certiorari.

(c) Counsel did not properly serve three copies of the Petition for Writ of Certiorari on respondents.

(d) Counsel for petitioners brought into question the validity of a state statute and the attorney general of that state is not a party nor has been served, nor has any initial pleading recited that 28 U.S.C. 2043(b) may be applicable as is required by Rule 28 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

Supreme Court Rules:

Rule 17. Considerations Governing Review on Certiorari. See appendix.

Rule 20. Review on Certiorari--Time for Petitioning. See appendix.

Rule 28. Filing and Service--Special Rule for Service Where Constitutionality of Act

of Congress or State Statute is in Issue. See appendix.

Rule 29. Computation and Enlargement of Time. See appendix.

28 U.S.C.

§ 1257 State courts; appeal; certiorari. See appendix.

§ 2101 Supreme Court; time for appeal or certiorari; docketing; stay. See appendix.

§ 2403 Intervention by United States or a State; constitutional question. See appendix.

Civil Rules for Superior Court of Washington:

Rule 60. Relief from Judgment or Order. See appendix.

Rule 70. Judgment for Specific Acts; Vesting Title. See appendix.

Revised Code of Washington:

RCW 4.27.050 Conditions precedent to vacation. See appendix.

RESTATEMENT OF CASE

Petitioners have omitted certain facts in the case, therefore, we restate the case.

Respondents contracted for the purchase of a mobile home park from petitioners. The parties executed an Earnest Money Receipt and Sale Agreement, and the respondents deposited $1,000.00 in escrow on June 26, 1979, with all parties present. The Earnest Money Receipt and Sale Agreement provided for attorney's fees and costs to be payable to the innocent party in the event legal services regarding enforcement of rights were necessary.

On July 16, respondents executed all documents at Puget Sound Escrow and paid the balance of the full down payment due.

Petitioners refused to fulfill their contractual obligations and would not

convey the property. Consequently respondents brought suit to enforce the sale agreement. The petitioners not affirmatively responding in any way, an Order of Default was granted on August 15, 1979, with Findings of Fact and Conclusions of Law and a Judgment entered thereafter. Judgment vested title in respondents pursuant to Washington Court Rule 70.

Petitioners' attorney moved to vacate the judgment, which motion was denied on September 10, 1979, on the grounds that there were no valid defenses pursuant to Washington Court Rule 60 and the Revised Code of Washington (RCW) 4.72.050. A demand for revision was filed and depositions of respondents and the escrow agent were taken. Based on the depositions and the materials supplied, the affidavits of the respective parties and the briefs on authorities and arguments of counsel, the

demand for revision was denied by Order dated November 30, 1979. A motion for reconsideration of the order denying the demand for revision was made by petitioners' substituted attorney, Philip DeTurk, and was denied December 14, 1979.

This matter was appealed to Division II of the Court of Appeals, and respondents once again prevailed.

The unpublished opinion of Division II, which awarded additional $3,000.00 attorney's fees on appeal as well as costs on appeal was filed on August 27, 1981, and is appended to petitioners' petition.

Petitioners then petitioned for discretionary review before the Washington Supreme Court which petition was denied on November 20, 1981. Petitioners willfully failed to comply with the Judgment, and it was necessary to appoint an attorney to complete necessary documents, which

occurred April 1, 1982. Petitioners called the office of the appointed party and requested payment of the funds paid to the appointed attorney, and received them.

A noncomplying Petition for Writ of Certiorari was thereafter served upon respondents' counsel. Upon request to the United States Supreme Court regarding procedure for response, counsel was told the petition had been returned to petitioner as improperly submitted. No motion for extension or enlargement of time for filing was received and counsel was served with one copy of a Petition for Writ of Certiorari on or about March 23, 1982.

ARGUMENT

1. (a) Jurisdictional Argument

Pursuant to Rules of the Supreme Court 17.1(c) and also pursuant to 28 U.S.C. 1257(3) the court has jurisdiction by Petition for Certiorari when a state court

of last resort has decided questions affecting federal rights in one manner or another. Prerequisite to this jurisdiction is that the question must have been properly raised in state court and passed on therein. This has not been done in this case as is seen by the annotations on the Petition for Certiorari of the petitioners.

Failure to draw into state court the allegation of a violation of a constitutional right and have the court pass on it is prohibitive of any review by the United States Supreme Court as is stated in Cardinale v. State of Louisiana, 394 U.S. 437, 22 L. Ed. 2d 398, 89 S. Ct. 1162 (1969):

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet 368, 9 L. Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch

344, 3 L. Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, § 25, 1 Stat 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet 368, 391, 9 L. Ed. 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v. Nicholls, 4 Wheat 311, 315, 4 L. E. 578, 579 (1819), and since e.g. Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc., 360 U.S. 334, 342, n. 7, 3 L. Ed. 2d 1280, 1286, 79 S. Ct. 1196 (1959); State Farm Mutual Automobile Ins. Co. v. Duel, 324 U.S. 154, 160-163, 89 L. Ed. 812, 817-819, 65 S. Ct. 573 (1945); McGoldrick v. Compagnie Gernerale Transatlantique, 309 U.S. 430, 434-435, 84 L. Ed. 849, 851-852, 60 S. Ct. 670 (1940); Whitney v. California, 274 U.S. 357, 362-363, 71 L. Ed. 1095, 1100-1101, 47 S. Ct. 641 (1927); Dewey v. Des Moines, 173 U.S. 193, 197-201, 43 L. Ed. 665, 667-668, 19 S. Ct. 379 (1899); Murdock v. City of Memphis, 20 Wall 590, 22 L. Ed. 429 (1875).

(b) Procedural Defects.

Other procedural defects have occurred herein, namely that petitioners have not

timely filed their Petition for Certiorari according to United States Supreme Court Rule 20, 28 U.S.C. 2101. Court Rules 29.2 and 29.4 of the Supreme Court further state that any extension for time of filing must be made by motion to a justice of the court. No such motion was served on respondents and we therefore assume that it was not made. Other procedural errors are as follows:

(i) failure to serve three copies of the Petition for Certiorari on respondents as is required by Rules of the Supreme Court 28.3;

(ii) failure to serve any pleading on the Attorney General of the State reciting that 28 U.S.C. § 2403(b) may be applicable insofar as petitioner has attempted to draw into question the constitutionality of a state statute, as is required by Rules of the Supreme Court

28.4(c) in a case such as this where the state is not a party; and

(iii) failure to file for an extension of time to file a Petition for Certiorari as is required by Rules of the Supreme Court 29.

2. Issues Presented for Review.

A federal rule of civil procedure does not constitute the basis for invalidating a state statute. Federal rules of civil procedure were intended to set up modes of proceeding and not to affect substantive rights nor to set up minimum criteria for procedural matters in state courts as is stated in Perry v. Allen, 239 F.2d 107 (5th Cir. 1956) at 111:

> It is plain that these Rules are designed to provide the machinery for the administration of justice, the modes of proceeding by which legal rights are enforced; and do not purport to deal with the law which gives or defines such rights, or their character, or the existence or boundaries of the remedies

> vouchsafed for the establishment of those rights; and that the procedures they provide are only means to the end of achieving substantial justice and are not ends in themselves.

The court goes on to quote from Sibbach v. Wilson & Co., 1941, 312 U.S. 1, 10 et seq., 655, 61 S. Ct. 422, 424, 85 L. Ed. 479:

> "Hence we conclude that the Act . . . was purposely restricted in its operation to matters of pleading and court practice and procedure. Its two provisos or caveats emphasize this restriction. The first is that the court shall not 'abridge, enlarge, nor modify the substantive rights', in the guise of regulating procedure."

Furthermore, the very statute petitioners seek to invalidate as unconstitutional follows the same test for vacation of judgment as does federal law. Washington Revised Code 4.27.050 states:

> The judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action.

As the court stated in Pennsylvania

National Bank & Trust Co. v. American Home Assurance Co., 87 F.R.D. 152 (1980) at 154-155:

> To open a default judgment, the federal court must find that defendant has a meritorious defense, . . . To convince the court that defendant has a valid defense, it must produce credible factual allegations rather than a perfunctory statement that the meritorious defense exists. [Citations omitted]. True, the law disfavors default judgments, but this policy does not vitiate the requirement of a meritorious defense which burden rests upon the moving party. Wokan v. Alladin International, Inc., 485 F.2d 1232, 1234 (3d Cir. 1973). Where that burden cannon be met, defendant's motion to open the default judgment must be denied. Design & Development, Inc. v. Vibromatic Manufacturing, Inc., 58 F.R.D. 71, 73 (E.D.Pa. 1973).
>
> In the case at bar, defendant proposes as meritorious the defense that the
>
> > policy of insurance issued by the defendant to [plaintiff] did not conform to the policy of insurance agreed to by and between defendant and [plaintiff] in that a policy of insurance did not have attached thereto [language] endorsing and/or limiting the coverage to those perils agreed to.

Even if an abuse of discretion would be deemed a federal question, (even though

not raised below as such), in the case at bar, petitioners had every opportunity to present affidavits and have counsel argue as to what they determined to be the merits of their case. The court of appeals in its opinion, which is an appended to the Petition, covers very well all the issues raised by the petitioners herein (and they are less meritorious than that raised above); a different judge of the trial court passed on the rulings of the commissioner; an appeals court passed on the rulings of the trial court and the commissioners; the Washington Supreme Court denied review. Petitioners have had several years of a "day in court".

This petition should further be dismissed because of petitioners' affirmatively accepting the benefits of the enforcement of the judgment. Where a party accepts the benefits of a ruling, their

right to appeal is barred. 4 Am. Jur. 2d § 250 and law cited therein.

Respondents should have attorney's fees and costs as a result of this action. In the courts below pursuant to the terms of the contract, which is an appendix to petitioners' Petition, there is a provision that states:

> In the event that either the seller or the purchaser shall be caused to secure legal services or advice to enforce any of the respective rights hereunder, the non-defaulting or innocent party with respect to this enforcement provision shall be entitled to reasonable attorney's fees on account thereof together with any costs incident to the actual legal proceedings concerning the terms of the agreement.

Respondents have had to incur substantial additional attorney's fees and costs in responding to this Petition for Certiorari. Respondents should therefore have additional attorney's fees in the amount of $5,000.00 and costs incurred according to the contractual provisions.

CONCLUSION

The Supreme Court Does not have jurisdiction on this petition for Writ of Certiorari because of petitioners' numerous failures to comply with the Rules of the United States Supreme Court, to-wit: Nontimely filing of the Petition for Writ of Certiorari, failure to move for an extension of time within which to file the petition; failure to properly serve the required number of copies on respondents; and failure to recite that 28 U.S.C. § 2403(b) may be applicable in the initial pleading and serve same on the Attorney General of the State of Washington as is required because petitioners have attempted to draw into question the constitutionality of a state statute. Even more importantly, however, the petitioners failed to present at any level of state court any federal question, nor has any level of state court

ruled on any federal question in this matter.

As to the issues presented by the petitioners, it is clear that the Rules of Federal Procedure do not control the exercise of discretion in a state court following its own state law. This is especially true in a case where the petitioners are attempting to draw the constitutionality of that state law into question and where federal law itself requires the same procedure as does the state law. That is, in order to vacate a judgment, the defendants must first show that they had a valid defense. If this were not the case, much more court time would be wasted than is even now true.

The discretionary action of a judge is not a federal question with reference to due process or any other matter; certainly it is not where, as in the instant case,

petitioners had numerous occasions and court hearings with regard to their allegations and defenses.

The contractual provisions which have been the subject of this action provide that the innocent party should be awarded their expenses of legal counsel, fees, and costs incurred. With respect to that matter, respondents pray that the court award them additional attorney's fees of $3,500.00 and their costs incurred herein as provided by the rules and statutes of the court and the contractual provisions herein.

Respectfully submitted,

DOLACK, HANSLER, HULSCHER,
BURROWS, DAYHOFF & BARLINE

By_____
Richard J. Dolack

Attorneys for Respondents

Appendix

APPENDIX

Supreme Court Rules:

Rule 17. Considerations Governing Review on Certiorari

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

. . .

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Rule 20. Review on Certiorari--Time for Petitioning

. . .

.2 A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the Clerk within the time prescribed by law. See 28 U.S.C. § 2101(c).

Rule 28. Filing and Service--Special Rule for Service Where Constitutionality of Act of Congress or State Statute is in Issue.

. . .

.3 Whenever any pleading, motion, notice, brief, or other document is required by these Rules to be served, such service may be made personally or by mail on each party to the proceeding at or before the time of filing. If the document has been produced under Rule 33, three copies shall be served on each other party separately represented in the proceeding. If the document is typewritten, service of

a single copy on each other party separately represented shall suffice. If personal service is made, it may consist of delivery, at the office of counsel of record, to counsel or an employee therein. If service is by mail, it shall consist of depositing the document in a United States post office or mailbox, with first-class postage prepaid, addressed to counsel of record at his post office address. Where a party is not represented by counsel, service shall be upon the party, personally or by mail.

.4 . . .

(c) In any proceeding in this Court wherein the constitutionality of any statute of a State is drawn in question, and the State or any agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper in the Court shall recite that 28 U.S.C. § 2403(b)

may be applicable and shall be served upon the Attorney General of the State. In proceedings from any court of the United States as defined by 28 U.S.C. § 451, the initial pleading, motion, or paper shall state whether or not any such court, pursuant to 28 U.S.C. § 2403(b), has certified to the State Attorney General the fact that the constitutionality of such statute of the State was drawn in question.

Rule 29. Computation and Enlargement of Time

. . .

.2 Whenever any Justice of this Court or the Clerk is empowered by law or under any provision of these Rules to extend the time for filing any document or paper, an application seeking such extension must be presented to the Clerk within the period sought to be extended. However, an application for extension of time to docket an

appeal or to file a petition for certiorari shall be submitted at least 10 days before the specified final filing date and will not be granted, except in the most extraordinary circumstances, if filed less than 10 days before that date.

.3 An application to extend the time within which a party may docket an appeal or file a petition for a writ of certiorari shall be presented in the form prescribed by Rules 12.2 and 20.6, respectively. . . .

.4 Any application for extension of time to file a brief, motion, joint appendix, or other paper, to designate parts of a record for printing in the appendix, or otherwise to comply with a time limit provided by these Rules (except an application for extension of time to docket an appeal, to file a petition for certiorari, to file a petition for rehearing, or to

issue a mandate) shall in the first instance be acted upon by the Clerk, whether addressed to him, to the Court, or to a Justice. Any party aggrieved by the Clerk's action on such application may request that it be submitted to a Justice or to the Court. The Clerk's action under this Rule shall be reported by him to the Court in accordance with the instructions that may be issued to him by the Court.

28 U.S.C.:

§ 1257. State Courts; Appeal; Certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in

question on the ground of its being repugnant to the Constitutuion, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

§ 2101. Supreme Court; Time for Appeal or Certiorari; Docketing; Stay

. . .

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of

certiorari for a period not exceeding sixty days.

§ 2403. Intervention by United States or a State; Constitutional Question

. . .

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to

court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

June 25, 1948, c. 646, 62 Stat. 971; Aug. 12, 1976, Pub. L. 94-381, § 5, 90 Stat. 1120.

Civil Rules for Superior Court of Washington:

Rule 60. Relief From Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceeding;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic),

misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this subdivision (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion

as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of Judgment

(1) Motion. Application shall be made by motion filed in the cause stating the ground upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion,

affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy therof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-090 shall remain in full force and effect.

[Amended Sept. 26, 1972; Jan. 1, 1977.]

Rule 70. Judgment for Specific Acts; Vesting Title

If a judgment directs a party to execute a conveyance of land or to deliver deeds or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party

and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

Revised Code of Washington:

4.72.050 Conditions precedent to vacation. The judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action; and when judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment.

END OF DOCKET